





**1900090 (Migration) [2023] AATA 3386 (19 September 2023)**

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division

**REPRESENTATIVE:** Mr Vikas Jain

**CASE NUMBER:** 1900090

**MEMBER:** Edward Howard

**DATE:** 19 September 2023

**PLACE OF DECISION:** Brisbane

**DECISION:** The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.221(2) of Schedule 2 to the Regulations

Statement made on 19 September 2023 at 11:16am

**CATCHWORDS**

*MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – pooled financial resources – social recognition of the relationship – marriage and cohabitation for over 5 years – joint residential property – death of the sponsor – close business and personal ties in Australia – decision under review remitted*

**LEGISLATION**

*Migration Act 1958, ss 5, 65*

*Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.15*

**CASES**

*Ally v MIAC [2008] FCAFC 49*

*Bretag v IRT [1991] FCA 582*

*He v MIBP [2017] FCAFC 206*

*Jayasinghe v MIMA [2006] FCA 1700*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The review applicant applied for the visa on 5 June 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The sponsorship of the sponsor was refused by a decision dated 14 November 2018. Subsequently, the review applicant was provided with 28 days to allow a Natural Justice response to the decision. The review applicant did not provide any further evidence or comments by the expiration of the Natural Justice period.
4. As a result, in a decision of 20 December 2018, the delegate refused to grant the visa on the basis that the review applicant did not satisfy cl 820.221.
5. The review applicant appeared before the Tribunal on 5 September 2023 to give evidence and present arguments. The Tribunal also received oral evidence from a friend of the review applicant, [Friend A].
6. The review applicant was represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### **BACKGROUND**

8. The review applicant is [name], born [on date], a citizen of the Philippines. The sponsor was [name], an Australian citizen, born [on date].
9. The parties first met in January 2017, committed to each other in March 2017 and commenced cohabiting at that time. The parties were married in Brisbane [in] April 2017.
10. The review applicant lodged a valid combined Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence) (Class BC) (Subclass 801) visa on 5 June 2017.
11. By a decision of 20 December 2018, the visa application was refused as the review applicant was unable to satisfy the criteria contained in Reg 820.221.
12. [The sponsor] subsequently died [in] September 2022.

### **ISSUES AND LAW**

13. There is a two-stage process for onshore Partner visas. A visa applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the first, temporary stage.

14. Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.15A(3) matters may relate to circumstances after the time of application. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the review applicant were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.<sup>1</sup> The Tribunal observes this to be a matter where the visa applicant submitted limited documentary evidence in support of her visa application to the Department of Home Affairs and then furnished the Tribunal with extensive further evidence that was unavailable to the primary decision maker.
15. The issue in the present case is whether at the time of the visa application and the time of this decision, the parties satisfy the criteria under cl.820.211 and cl.820.221.

### **Whether the parties are in a spouse or de facto relationship**

16. Clauses 820.211(2) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
17. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

### **Are the parties validly married?**

18. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

### **Are the other requirements for a spouse relationship met?**

*Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*

19. In relation to the financial aspects of the relationship, the review applicant has provided joint bank account statements and various receipts and proofs of payment of utilities bills, household and other regular expenses. The evidence supports the fact that the parties pooled their financial resources and shared the regular household bills and expenses.

<sup>1</sup> *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it 'tends to logically show the existence or non-existence of' the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

20. The review applicant currently lives in a property that was jointly owned by herself and the sponsor and which is currently still subject to a mortgage. The sponsor's interest in the property has transferred on his death to the review applicant, pursuant to the joint tenancy. The review applicant has also provided a copy of the Certificate of Title of the property confirming ownership.
21. The Tribunal is satisfied on the evidence of the parties, that they pooled their resources for day-to-day household expenses and other financial commitments. The Tribunal is satisfied that the parties jointly owned a major asset in their principal place of residence and significant joint liabilities including the mortgage over their property. The Tribunal is satisfied that both parties contributed to the financial relationship of the marriage. The Tribunal weighs the financial aspects of relationship in favour of the review applicant.

*Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*

22. The parties lived together from March 2017 until the death of the sponsor [in] September 2022. The parties resided at their jointly owned residence in [Town 1], Queensland. The parties have provided evidence in relation to the nature of the household and living arrangements.
23. The Tribunal is satisfied that the parties' household and living arrangements are consistent with that of a married couple in a genuine relationship. The Tribunal weighs consideration of the household aspects of the relationship in favour of the review applicant.

*Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*

24. The review applicant provided extensive evidence supporting the claim of the parties being a married couple in a genuine relationship. The evidence demonstrates the clear recognition by other people, of the relationship between the parties, recognising the parties as a genuine couple over a period of five and a half years of marriage prior to the death of the sponsor in September 2022.
25. The Tribunal is satisfied on the evidence that the parties represented themselves to other people as being married to each other and that they held the favourable opinion of family, friends and acquaintances about the nature of the relationship. The Tribunal weighs the social aspects of the relationship in favour of the review applicant.

*Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*

26. The parties first met in January 2017 and begin their relationship. They committed to each other, to the exclusion of all others in March 2017 and began cohabiting at that time.
27. Subsequently, the parties were married [in] April 2017. The parties jointly owned their residence at [Address 1], Queensland. The parties resided together at this address from March 2017 onwards.
28. The evidence supports a finding that the parties had a genuine and continuing relationship, showing strong commitment to each other and clearly saw the relationship as long-term. The Tribunal weighs the nature of the commitment in favour of the review applicant.

29. The visa applicant lodged a valid combined Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence) (Class BC) (Subclass 801) visa on 5 June 2017.
30. By a decision dated 20 December 2018, the parties were advised that the visa application was refused as the review applicant was unable to satisfy the criteria contained in Reg 820.221.
31. [The sponsor] subsequently died [in] September 2022.
32. The Tribunal is satisfied that at the time the visa application was made, the parties satisfied the definition of "Spouse" as defined in Section 5F of the Act; in that they were validly married; had a mutual commitment to a shared life as a married couple to the exclusion of others; that the relationship between them was genuine and continuing; and that they lived together. The Tribunal is therefore satisfied that the parties relationship fulfilled the criteria contained in cl.820.211(2) of the Regulations at the time the visa application was made.
33. Pursuant to cl.820.221(1), in order to be eligible for the grant of a Subclass 820(UK) visa, the review applicant must also continue to meet the requirements of cl.820.211(2) at the time of this decision. Having regard to the evidence before the Tribunal of the death of the sponsor, this threshold is, prima facie, unable to be satisfied. Cl 820.221 can alternatively be met if, relevantly, the requirements of cl 820.221(2) are met.
34. Clause 820.221(2) of the Regulations states as follows:
  35. (2) *an applicant meets the requirements of this subclause if the applicant:*
    36. (a) *would continue to meet the requirements of subclause 820.211(2), (5) or (6) except that the sponsoring partner has died; and*
    37. (b) *satisfies the Minister that the applicant would have continued to be the spouse or de facto partner of the sponsoring partner if the sponsoring partner had not died; and*
    38. (c) *has developed close business, cultural or personal ties in Australia.*
39. Having regard to all the evidence, the Tribunal is satisfied that the review applicant would have continued to meet the requirements of cl 820.211(2) except that the sponsoring partner has died. Therefore, the review applicant satisfies cl 820.221(2)(a).
40. Further, having regard to all the evidence, the Tribunal is satisfied that the review applicant would have continued to be the spouse of the sponsoring partner if the sponsoring partner had not died. Therefore, the review applicant satisfies cl 820.221(2)(b).
41. In considering cl 820.221(2)(c), the Tribunal has had regard to the following evidence:
  - (i) the review applicant has lived in Australia for almost 7 years and was married to the sponsor for 5 ½ years;
  - (ii) the review applicant purchased a residential property, with her husband, in June 2017, subject to a mortgage with [a named bank];
  - (iii) the review applicant continues to own the residential property, the sponsor's share having passed to her under the joint tenancy upon his death and she continues to pay the mortgage over the property;

- (iv) the review applicant has been gainfully employed in Australia as [an occupation 1] for over five years;
- (v) the review applicant has worked mainly in [a specified area] as [an occupation 1];
- (vi) the review applicant has developed an extensive network of close personal friends and acquaintances in Australia, including many with Australian citizens and Australian permanent residents;
- (vii) the review applicant has also developed personal friendships with many of the [clients] whom she assists on a daily basis and their families;
- (viii) the review applicant is an active member of a church congregation in [Town 2], Queensland; and
- (ix) the review applicant regularly socialises with work colleagues and other members of her church congregation;

42. Having regard to all the evidence, the Tribunal is satisfied that the review applicant has developed close business, cultural or personal ties in Australia. The review applicant therefore satisfies cl 820.221(2)(c).
43. Therefore, having carefully considered all the evidence before it, the Tribunal is satisfied that the review applicant meets the requirements of cl 820.221(2) at the time this decision.
44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

## **DECISION**

45. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.221(2) of Schedule 2 to the Regulations

Edward Howard  
Member



## ATTACHMENT - Extract from Migration Regulations 1994

### 1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).